IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 573 OF 2007

The Kopargaon Sahakari Skhar
Karkhana Limited .... Petitioner

versus

Kadwa Sahakari Sakhar
Karkhana Limited & ors. ..... Respondent.

Shri Vaibhav Joglekar i/b M.G.Gawde for the petitioner
Shri P.N.Joshi for Respodent no.1

CORAM; A.P. DESHPANDE, J.
DATED; 4TH JULY, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The present petitioner is a co-operative sugar factory having a distiliary unit. The respondent no.1 is the original plaintiff whereas the respondents 2 to 4 are original defendants 2 to 4. The plaintff has filed a suit claiming money decree against the defendants jointly and severally for an amount of Rs. 31,71,562/- together with interest thereon. The present petitioner has opposed the claim in the suit. Having regard to the pleadings of the parties, the trial court framed issues at Exh.19 on 16-6-2006. The present petitioners moved an application at Exh.20 for

framing of an additional issue, touching the maintainability of the suit in view of absence of notice under section 164 of the Co-operative Societies Act. That application was opposed and the trial court by passing an order below Exh.20 rejected the application by observing thus:

> There is no need of framing issue on the law point and it would be covered by issue no.6. Hence rejected.

My attention is also invited to issue no.6 which reads thus:

> Whether the plaintiff is entitled to recover suit amount from the defendants with future interest ?

It is obvious that issue no.6 does not encumpass the issue of maintainability of the suit for want of notice under section 164. Thus, the impugned order is wholely unsustainable and suffers from patent illegality. The learned counsel for the respondent conceeds that the order passed below Exh.20 declining to frame issue as claimed by the petitioner is unsustainable in law.

4. Another application came to be moved by the petitioner before the trial court after the rejection of the first application and the second application is purpoprted to have been field under Order 7 Rule 11(d) read with Order 14 Rule 2 of CPC. It is contended that the Civil Court has no jurisdiction to try the suit in view of the provisions of section 91 of the Co-operative Societies Act. The trial court has rejected the said application on the ground that the suit is fixed for cross examination of the plaintiff's witness and by further observing that the defendants, by filing the said application, intends to protract the litigation.

5. As I have already held that an issue touching the maintainability of the suit on account of want of notice under section 164 need to be framed, I deem it appropriate to further direct the trial court to frame an issue about the jurisdiction of the civil court to try the suit in view of section 91 of he Maharashtra Co-opetative Societies Act. The learned counsel for the respondents fairly submits that as the said contention is already raised in the written statement, the said issue can be directed to be framed. The learned counsel for the petitioner submits that if issues touching section 164 of the Co-operative Societies Act and the issue touching section 91 of the

Co-operative Societies Act are framed, he does not press the application at Exh.G on page 44.

6. In this view of the matter the writ petition is partly allowed. The impugned order passed by the trial court dated 17-8-2006 passed below Exh.30 and order dated 20-8-2006 passed below Exh.25 are quashed and set aside. The trial court is directed to frame the following issues:

a) Whether the suit is maintainable for want of notice under section 164 of the Co-operative Societies Act ? and

b) Whether civil court has jurisdiction to try the suit in view of section 91 of the Co-operative Societies Act ?

Rule made absolute in the above terms.

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